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# LOST IN *FOREST GROVE*: INTERPRETING IDEA'S INHERENT PARADOX

Natalie Pyong Kocher\*

## I. INTRODUCTION

Until 1975, children with disabilities were frequently confined to inferior educational placements or provided no education at all. The passage of the Individuals with Disabilities Education Act ("IDEA"), a major civil rights bill, provided these children heightened protection. At the heart of the IDEA is a school district's responsibility to provide each child with an individualized education, often referred to as a "free appropriate public education" ("FAPE").<sup>1</sup> Congress explicitly requires school districts to provide special education and related services designed to meet unique needs and prepare children with disabilities for further education, employment, and independent living." Where a public school district is itself unable to provide a FAPE, IDEA requires the district to pay for the student's enrollment in a private school.<sup>2</sup> This provision has been highly controversial because although such placements are essential for students with serious difficulties they have added to the financial strain of school districts. It is in this context that we see a major issue impacting special education in America.

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1. 20 U.S.C. § 1400(d)(1)(A) (2006) (originally enacted in 1970).

2. Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370 (1985).

After Congress amended IDEA in 1997, some courts categorically barred private school reimbursement for students who had not previously enrolled in a public school special education program.<sup>3</sup> These courts interpreted IDEA to require that parents give public school districts an opportunity to provide a FAPE before removing their child to private school.<sup>4</sup> With this bar, a paradox emerged: Students with disabilities could only obtain a FAPE after attending a public school which denied them a FAPE. As the Court in *School Committee of Town of Burlington v. Department of Education* noted, the paradox placed parents in the unenviable position of either choosing to keep their child in an inappropriate placement in hopes of receiving an appropriate placement later, or placing the child in an appropriate placement immediately without the guarantee of reimbursement.

In *Forest Grove School District v. T.A.*, the United States Supreme Court overruled these decisions, holding that parents of children with disabilities could seek tuition reimbursement for private school placements regardless of whether their child had previously received special education from a public school.<sup>5</sup>

The *Forest Grove* decision was hailed as “very important.”<sup>6</sup> Kim Sweet, Executive Director of Advocates for Children of New York, said the ruling “preserve[d] the right to a free, appropriate public education for kids with disabilities, whether or not their school district [was] able to offer them an appropriate program.”<sup>7</sup> A number of insurmountable hurdles, however, may prevent parents from exercising this right.

Although *Forest Grove* was decided in favor of parents, inherent structural factors continue to thwart IDEA’s mandate to provide an individualized free and appropriate education for all children. The paradox remains. For the most part, children with special needs are still denied a FAPE. Part II of this Note summarizes the pertinent provisions of IDEA, including the statutory framework necessary to understand *Forest Grove*, and examines the remedial right to tuition reimbursement under IDEA. This section also discusses the inherent paradox that results from interpreting IDEA as categorically barring tuition reimbursements to parents who unilaterally remove their child. Part III surveys significant circuit court cases preceding *Forest Grove* and describes the factual and

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3. See e.g., *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 160 (1st Cir. 2004).

4. *Id.*

5. *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009). Court documents refer to minors by their initials to protect the minors’ identities.

6. Elizabeth Stull, *Potential Impact of U.S. Supreme Court’s ‘Forest Grove’ Ruling Questioned by Rochester Attorneys*, DAILY RECORDER (ROCHESTER, N.Y.), July 13, 2009, available at <http://nydailyrecord.com/blog/2009/07/13/potential-impact-of-8216forest-grove-8217-questioned-here/> (last visited April 1, 2010).

7. *Id.*

judicial background of the *Forest Grove* case. Part IV examines the *Forest Grove* decision itself and analyzes the Supreme Court's majority and dissenting opinions. Part V discusses parents' practical inability to exercise the right provided by *Forest Grove* and the narrow circumstances to which this right applies. Finally, Part VI proposes that although *Forest Grove* has minimal impact on the accessibility of special education, the decision itself serves as a reminder of what all this fighting *should* be about — ensuring *all* children have access to a free, appropriate public education.<sup>8</sup>

## II. THE INDIVIDUALS WITH DISABILITIES ACT

### A. FRAMEWORK

Congress enacted IDEA “to ensure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs . . . [and] to ensure that the rights of children with disabilities and parents of such children are protected.”<sup>9</sup> In order to receive federal funding under IDEA, a state must meet the FAPE standard.<sup>10</sup> School districts must provide a written Individualized Education Plan (“IEP”) to children with disabilities.<sup>11</sup> Developed with the collaboration of the child's parents, school administrators, and other specialists,<sup>12</sup> the IEP must take into consideration both the child's strengths and the parents' concerns.<sup>13</sup> IEPs must be reviewed annually to assess the level of success in the implementation of the child's IEP and to make any necessary modifications in order to meet the child's current needs.<sup>14</sup>

While IDEA requires school districts to provide the services necessary for the student to “benefit from the instruction,” it does not require the school to maximize the student's potential or provide the best possible program.<sup>15</sup> In *Board of Education v. Rowley*, the Supreme Court ruled that states meet the FAPE requirements “by providing personalized education

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8. See H. RUTHERFORD TURNBULL III, *FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES* 59-60 (1986) (explaining that following *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), “the exclusion of handicapped children from any opportunities to learn . . . is unconstitutional under the equal protection clause”).

9. 20 U.S.C. § 1400(d)(1); and see *Burlington*, 471 U.S. at 367.

10. 20 U.S.C. § 1412(1) (2006).

11. 20 U.S.C. § 1414(d)(1)-(2) (2006) (defining “individualized education program” and setting forth its requirements). An IEP must include: (1) the child's levels of educational performance; (2) “measurable” goals, including benchmarks or short-term objectives; (3) the services and supplementary assistance to be provided; (4) the frequency, location, and duration of services; and (5) the extent to which the child will be separated from non-disabled children. 20 U.S.C. § 1414(d)(1)(A).

12. 20 U.S.C. § 1414(d)(1)(B).

13. 20 U.S.C. § 1414(d)(3) (2006).

14. See 20 U.S.C. § 1414(d)(4)(A)(ii) (2006).

15. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1981).

with sufficient support services to permit the handicapped child to benefit educationally from that instruction.”<sup>16</sup> Therefore, in order to meet the FAPE standard, a public school is required only to offer a “basic floor of opportunity” for the student: An education that is “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”<sup>17</sup>

## B. PARENTAL RIGHT TO REIMBURSEMENT UNDER IDEA

The central issue in *Forest Grove* — tuition reimbursement for private school — has long been controversial. Courts have granted a number of remedies to enforce IDEA, including tuition reimbursement for the expenses parents incurred as a result of the public school's failure to provide a FAPE.<sup>18</sup>

### 1. ‘Appropriate’ Relief

IDEA empowers courts with broad discretion to “grant such relief as the court determines is appropriate.”<sup>19</sup> In the 1985 case, *School Committee of Town of Burlington v. Department of Education*, the Supreme Court recognized retroactive reimbursement for private school as “appropriate relief” authorized by IDEA.<sup>20</sup> In *Burlington*, the parents of a disabled child rejected the school district's proposed IEP, requested an administrative hearing, and then unilaterally moved their child to a private placement they believed would meet the child's educational needs.<sup>21</sup> At the hearing, it was eventually determined that the school district's proposed IEP did not offer a FAPE and that the parent's unilateral private placement was “the least restrictive adequate program.”<sup>22</sup> The school district argued that placement, preceding any judicial ruling, violated the “stay-put” provision of IDEA, which requires that a child stay in his or her current placement during the pendency of any appeal.<sup>23</sup>

The Court rejected the school district's argument, holding that the parents were entitled to tuition reimbursement because IDEA empowered the trial court to “grant such relief as it determines is appropriate,” and to deny reimbursement after finding an IEP inappropriate would contradict

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16. *Hendrick Hudson*, 458 U.S. at 189.

17. *Rowley*, 458 U.S. at 200, 207.

18. MITCHELL L. YELL, *THE LAW AND SPECIAL EDUCATION* 363 (2d ed. 2005).

19. 20 U.S.C. § 1415(i)(2)(C)(iii) (2006).

20. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985).

21. *Id.* at 359.

22. *Id.* at 363.

23. *See id.* at 364. The “stay-put” provision of IDEA states: “During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child.” 20 U.S.C. § 1415(j) (2006).

the right to a free education.<sup>24</sup> The Court did not consider this remedy as “damages,” but as a repayment of “expenses that [the school district] should have paid all along and would have been borne in the first instance had it developed a proper IEP.”<sup>25</sup> If a court ultimately determines the proposed IEP was appropriate, the parents are not entitled to reimbursement. Thus, parents who unilaterally place their child into a private placement act “at their own financial risk.”<sup>26</sup>

Eight years later, in *Florence County School District Four v. Carter*, the Supreme Court held that parents do not lose their right to tuition reimbursement even if the private school selected does not meet all of IDEA’s requirements for public schools.<sup>27</sup> This decision reached further than *Burlington*, which involved reimbursement for a state-approved private school.<sup>28</sup> *Carter* affirmed that a parent may receive reimbursement when the IEP proposed by the public school violates IDEA and the parents’ preferred placement is appropriate for the child.<sup>29</sup> “[I]t hardly seems consistent with the Act’s goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child’s needs in the first place.”<sup>30</sup> As a result, private school placements are only required to meet the broad “appropriate” relief standard.

## 2. 1997 Revisions to IDEA

In 1997, Congress amended IDEA to explicitly address the remedy of tuition reimbursement.<sup>31</sup> Congress added to IDEA § 1412(a)(10)(C)(ii), entitled “Payment for education of children enrolled in private schools without consent of or referral by the public agency,” which states:

If the parents of a child with a disability, *who previously received special education and related services* under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free

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24. *Burlington*, 471 U.S. at 369.

25. *Burlington*, 471 U.S. at 370-71.

26. *Id.* at 373-74.

27. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12 (1993) (explaining tuition reimbursements are not an unreasonable burden on school districts because the school has the initial opportunity to offer an appropriate IEP within a public or private setting).

28. *Burlington*, 471 U.S. at 362.

29. *Florence County*, 510 U.S. at 12.

30. *Id.* at 14.

31. 20 U.S.C. § 1412(a)(10)(C)(ii) (2006).

appropriate public education available to the child in a timely manner prior to that enrollment.<sup>32</sup>

The ambiguity of the phrase, "who previously received special education and related services" throws previous IDEA interpretations into question. It is unclear whether the parental right to reimbursement continues to exist where the child never previously received special education services from the public agency. Here is the core of the problem, an ambiguous phrase that opened the uncertainty wider, and lead to the ruling in *Forest Grove*.

Section 1412(a)(10)(C)(i) codifies the decision in *Burlington* by stating that a public agency is not required to "pay for the cost of education . . . if that agency made a free, appropriate public education available to the child and the parents elected to place the child in such private school or facility."<sup>33</sup> However, § 1412(a)(10)(C)(iii) requires that parents notify the school district of their concerns about the IEP at the most recent IEP meeting or ten days before removing their child to private school.<sup>34</sup> Reimbursement can be reduced or denied if parents refuse to cooperate with the school district or if the court finds the parents' actions were unreasonable.<sup>35</sup>

### 3. The Inherent Paradox of IDEA's Private Tuition Reimbursement Provision

IDEA's 1997 revision brought greater confusion and controversy to the process by which a child with disabilities might be unilaterally placed in and reimbursed for private school. Much like the paradox confronting the Court in *Burlington* — whether the stay-put provision could be consistently read with IDEA's overarching goal of universalizing a FAPE for all children — the issue in *Forest Grove* was how to read the new §1412(a)(10)(C)(ii) consistently against IDEA's overarching educational goal.

Reading §1412(a)(10)(C)(ii) as a categorical bar to students with disabilities contradicts the express purpose of IDEA and produces illogical results.<sup>36</sup> Parents are placed in a lose-lose situation. To maintain the options for reimbursement, parents are forced to enroll their child in an inappropriate public placement in order to meet the "previously received" requirement.<sup>37</sup> Parents who choose instead to immediately move their child into an appropriate placement are left with no effective remedy, even

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32. 20 U.S.C. § 1412(a)(10)(C)(ii) (emphasis added).

33. 20 U.S.C. § 1412(a)(10)(C)(i) (2006).

34. 20 U.S.C. § 1412(a)(10)(C)(iii) (2006).

35. *Id.*

36. *Forest Grove*, 523 F.3d at 1087.

37. *Id.*

though the school district would have denied their child a FAPE.<sup>38</sup> Conversely, school districts have an incentive to deny eligibility for special education services in order to avoid their obligations to reimburse parents.<sup>39</sup> If a school district refused to identify a disabled child, the child would never be eligible for special education from the school district, and consequently, would never be entitled to tuition reimbursements for private placements.<sup>40</sup>

Moreover, reading § 1412(a)(10)(C)(ii) as a categorical bar to tuition reimbursement for children who previously received public special education services conflicts with IDEA's child-find provision.<sup>41</sup> The child-find provision does not mention remedies, however, the interrelation between the two provisions demonstrates Congressional intent to provide them.<sup>42</sup> By enacting the child-find provision, Congress placed an affirmative obligation upon the states to identify all children with disabilities in both public and private schools.<sup>43</sup> It would be paradoxical for Congress then to deny reimbursement to those private school students that could not obtain a FAPE in public school due to the severity of their disability.<sup>44</sup>

Requiring public school enrollment as a prerequisite to tuition reimbursement generates absurd results.<sup>45</sup> For instance, if a child's disabilities were identified before the child reached school age and the public agency failed to provide a proper IEP, a parent would have no right to reimbursement unless the child first followed the deficient IEP, to the child's detriment.<sup>46</sup> Under such circumstances, public school enrollment as

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38. *Forest Grove*, 523 F.3d at 1087.

39. See Transcript of Oral Argument at 17-19, *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009) (No. 08-305). Justice Stevens suggested that under the school district's approach, by adamantly denying that a student is eligible for special education services, a school district might permanently avoid liability for reimbursing that student's tuition.

40. *Id.* at 17-19; see *Forest Grove*, 523 F.3d at 1087.

41. 20 U.S.C. § 1412(a)(3)(A) (2006). IDEA's child-find provision requires states to identify, locate, and evaluate all children with disabilities residing within their respective state, regardless of the severity of the disability. Child-find duties are "affirmative," and a parent is not required to request an evaluation of the child.

42. See Emily S. Rosenblum, Note, *Interpreting the 1997 Amendment to IDEA: Did Congress Intend to Limit the Remedy of Private School Tuition Reimbursement for Disabled Children?*, 77 *FORDHAM L. REV.* 2733, 2771-72 (2009).

43. *Id.*

44. *Id.*

45. *Id.* at 2761.

46. *Id.* The law of contract recognizes that when A anticipatorily breaches, B is not bound to perform. U.C.C. § 2-610 (Anticipatory Repudiation). The contract principle should apply *a fortiori* where B is a minor, who could avoid damage through placement in private school.



a prerequisite to tuition reimbursement can interrupt a child's education and create psychologically damaging results.<sup>47</sup>

### III. *FOREST GROVE SCHOOL DISTRICT v. T.A.*

#### A. CASE LAW LEADING TO *FOREST GROVE*

Whether § 1412(a)(10)(C) established a categorical bar to tuition reimbursement for students who have not previously received special education services under the authority of a public agency has been heavily litigated. Before *Forest Grove*, despite litigation at all judicial levels, the circuit courts remained divided, with the First Circuit interpreting a categorical bar, and the Second, Ninth, and Eleventh Circuits allowing parents to claim tuition reimbursements.<sup>48</sup>

*Greenland School District v. Amy N.* was the first circuit case to address this issue.<sup>49</sup> In *Amy N.*, Katie, the child, never received, nor was evaluated for, special education services while she attended public school.<sup>50</sup> In August 2000, at the end of her fourth grade year, Katie's parents unilaterally removed her from Greenland School District and enrolled her into a private school.<sup>51</sup> Katie enrolled in yet another private school in March 2001.<sup>52</sup> Greenland School District finally received the request for evaluation or notification that Katie might require special education services at this point, nearly seven months after Katie was unilaterally removed.<sup>53</sup> The First Circuit barred retroactive reimbursement, reasoning that the statute's objective was to "give the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate program, and determine whether a free and appropriate program can be provided in the public schools."<sup>54</sup> According to the court, Congress intended to revoke private school tuition reimbursement for students who had never received special education and related services from a public agency.<sup>55</sup>

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47. See Brief for the United States as Amicus Curiae Supporting Respondent at 25, *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 987 (2009) (No. 08-305). "Appropriate education during a child's formative years is critical to a child's development . . . . That is true for any youth; it may be especially true for a child with a disability."

48. See *Forest Grove*, 523 F.3d 1078, 1081 (9th Cir. 2008); *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 376 (2d Cir. 2006); *M.M. v. Sch. Bd. of Miami-Dade County*, 437 F.3d 1085, 1098 (11th Cir. 2006); *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004).

49. *Greenland*, 358 F.3d at 159.

50. *Id.* at 153.

51. *Id.*

52. *Id.*

53. *Id.* at 154.

54. *Id.* at 160.

55. *Id.* at 150.

In 2006, however, the Second and Eleventh Circuits interpreted the tuition reimbursement provisions broadly with no categorical bar to students that had not previously attended public school.<sup>56</sup> In *M.M. v. School Board of Miami-Dade County Florida*, the Eleventh Circuit held that under §1412(a)(10)(C)(ii), reimbursement cannot be denied solely because the child did not previously receive special education services from a public school. The court reasoned that requiring a parent to reserve their reimbursement rights by accepting an inappropriate IEP conflicts with the rights recognized in *Burlington* and its progeny.<sup>57</sup>

Six months later, the Second Circuit held in *Frank G. v. Board of Education*, that because of IDEA's purpose, tuition reimbursements must be implicitly allowed under §1412(a)(10)(C)(ii) even where the student had never received special education services from a public school.<sup>58</sup> Like the Eleventh Circuit, the Second Circuit reasoned that Congress merely intended to direct the 1997 Amendment at students who had previously received special education and related services, leaving courts with the option of applying principles of equity to those students who were not explicitly included, as was the case before the 1997 amendments.<sup>59</sup>

In 2007, the Supreme Court granted certiorari to address the issue in another Second Circuit case, *Tom F. v. Board of Education*.<sup>60</sup> The Court affirmed the Second Circuit in a two-line opinion, holding that a parent may receive reimbursement for a unilateral private placement even if the student did not previously receive public school services.<sup>61</sup> The decision was not precedential, however, because the Court split 4-4 after Justice Kennedy recused himself.<sup>62</sup> Only five days later, the Supreme Court denied certiorari in the First Circuit case, *Frank G. v. Board of Education of Hyde Park*, forgoing the opportunity to clarify § 1412(a)(10)(C)(ii).<sup>63</sup> This left courts divided, with the First Circuit denying reimbursement, and the Second, Eleventh, and Ninth Circuits allowing reimbursement claims

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56. See *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 359 (2d Cir. 2006) (granting tuition reimbursements to parents of children who were unilaterally placed in private schools having never received special education and related services from the public school district); *M.M. ex rel. C.M. v. Sch. Bd. of Miami-Dade County Fla.*, 437 F.3d 1085, 1099 (11th Cir. 2006).

57. *M.M.*, 437 F.3d at 1099.

58. See *Frank G.*, 459 F.3d at 370.

59. *Id.*

60. *Bd. of Educ. of City Sch. Dist. of City of N.Y. v. Tom F.*, 552 U.S. 1 (2007).

61. *Id.* (The two-line opinion read: "The judgment is affirmed by an equally divided court. Justice Kennedy took no part in the decision of this case.").

62. *Id.*

63. Mark Walsh, *Justices Decline to Hear 2nd IDEA Case on Tuition*, EDUC. WK. Oct. 24, 2007, at 25, available at <http://www.edweek.org/login.html?source=http://www.edweek.org/ew/articles/2007/10/24/09scotus.h27.html&destination=http://www.edweek.org/ew/articles/2007/10/24/09scotus.h27.html&levelId=2100>.

for students who had not previously received special education services in the public schools. The Supreme Court would resolve this issue in *Forest Grove*.

#### B. SUBSTANTIVE FACTS OF *FOREST GROVE*

T.A. attended public school in the Forest Grove School District from kindergarten until the spring semester of his junior year in high school.<sup>64</sup> T.A. struggled to advance through each grade, even with substantial help from his parents and sister at home.<sup>65</sup> Despite his inability to pay attention in class and complete his schoolwork unaided, T.A. never received special education services while enrolled in public school.<sup>66</sup> At one point, his guidance counselor suspected he might have a learning disability and referred him for an evaluation for special education services.<sup>67</sup> During internal meetings, which excluded T.A.'s parents, school staff members considered the possibility that T.A. had Attention Deficit Hyperactivity Disorder ("ADHD").<sup>68</sup> The school's psychologists and educational specialists formally evaluated T.A. and concluded that T.A. did not have a learning disability, deeming him ineligible for special education services under IDEA.<sup>69</sup> Not knowing that school district staff had suspected that T.A. had ADHD, his parents agreed that T.A. did not have a learning disability.<sup>70</sup>

After this evaluation, T.A. began to use marijuana.<sup>71</sup> Over the following year, T.A.'s marijuana use became regular and his behavior changed noticeably.<sup>72</sup> His behavior worsened to the point that he ran away from home, and police had to return him to his parents.<sup>73</sup> That year, T.A.'s parents took him to see a psychologist, and ultimately, to a hospital emergency room.<sup>74</sup> The psychologist "diagnosed T.A. with ADHD, depression, math disorder, and cannabis abuse."<sup>75</sup> The psychologist recommended a three-week residential program for T.A. because of his inability to reach his potential in school, his difficulties at home, his attitude toward school, his drug abuse problem, and his overall sense of

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64. *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1081 (9th Cir. 2008).

65. *Forest Grove*, 523 F. 3d at 1081.

66. *Id.* at 1081-82.

67. *Id.* at 1081.

68. *Id.* The notes from a January 16, 2001 meeting state "Maybe ADD/ADHD?" and the notes from a February 13, 2001 meeting mention "suspected ADHD." *Id.* ADHD is classified as a mental disorder, which is distinct from a learning disability. *Id.* at 1081, n.1.

69. *Id.* at 1081.

70. *Id.*

71. *Id.*

72. *Id.* at 1082.

73. *Id.* at 1081-82.

74. *Id.*

75. *Id.*

hopelessness.<sup>76</sup> T.A.'s parents complied with the psychologist's recommendation and after his discharge, placed T.A. in another residential private program designed for children with academic and behavioral difficulties.<sup>77</sup>

Days after placing T.A. in private school, T.A.'s parents contacted a lawyer who advised them to request a hearing under 20 U.S.C. § 1415(f) of IDEA and seek an order requiring the school district to evaluate T.A. in all areas of suspected disability.<sup>78</sup> Although Forest Grove "acknowledged T.A.'s learning difficulties, his diagnosis of ADHD, and his depression," the school district again concluded that T.A. did not qualify under IDEA "because those diagnoses did not have a severe effect on T.A.'s educational performance."<sup>79</sup> In the administrative hearing, the hearing officer rejected Forest Grove's conclusions, instead finding that T.A.'s ADHD adversely affected his educational performance and that Forest Grove did not fulfill its obligations under IDEA by failing to identify T.A. as eligible for special education services.<sup>80</sup>

Since Forest Grove failed to offer T.A. a FAPE and his private school placement was appropriate under IDEA, the hearing officer ordered Forest Grove to reimburse T.A.'s parents for the private school tuition, which cost \$5,200 per month.<sup>81</sup>

### C. PROCEDURAL HISTORY

#### 1. District Court Decision

Forest Grove appealed the hearing officer's decision to the U.S. District Court for the District of Oregon, arguing that the reimbursement was inappropriate because T.A. unilaterally withdrew from public school without providing prior notice to the school district, he never received special education and related services from the school district, and he withdrew for reasons unrelated to the disability. Although the district court agreed with the hearing officer's findings of facts, particularly that T.A. was disabled and thus entitled to special education, the court nonetheless held that T.A. was ineligible for reimbursement because he had not "previously received special education and related services" from Forest Grove, as required under § 1412(a)(10)(C)(ii) of IDEA.<sup>82</sup> Subsequently,

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76. *Forest Grove*, 523 F. 3d at 1082.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Forest Grove*, 523 F. 3d at 1082-83 (explaining that the school district was not responsible for the costs of the three-week rehabilitation program or the psychologist's evaluation, but was responsible for the private school tuition because the school district failed to provide T.A. with the minimum education IDEA mandated).

82. *Id.* at 1083.

T.A. filed an appeal to the U.S. Circuit Court of Appeals for the Ninth Circuit.<sup>83</sup>

## 2. The Ninth Circuit Decision

The Ninth Circuit adopted the Second Circuit's analysis in *Frank G.*, reversed the district court, and held the statutory requirements of §1412(a)(10)(C)(ii) did not apply to children who have not previously received special education. The Ninth Circuit's decision also limited the award of reimbursement to parents as a matter of equity pursuant to §1415(i)(2)(C).<sup>84</sup> The court reasoned that interpreting IDEA as categorically barring reimbursement to students who had not previously received public special education services contradicted the very purpose behind IDEA — to guarantee all students with disabilities a FAPE available to them.<sup>85</sup> Moreover, it would lead to the illogical result that parents had to wait until their child received inadequate special education services from a public school before sending the child to an appropriate private school.<sup>86</sup> Where, as here, the school district failed to cooperate in developing an effective IEP, the parents were left without any remedy.<sup>87</sup>

Despite the Ninth Circuit's alignment with the reasoning of the Second and Eleventh Circuits, the First Circuit still remained in direct conflict with the majority.<sup>88</sup> The Supreme Court granted certiorari on January 16, 2009, to answer the question it had failed to resolve in *Tom F. v. Board of Education*: "Whether § 1412(a)(10)(C) establishes a categorical bar to tuition reimbursement for students who have not previously received special-education services under the authority of a public agency."<sup>89</sup> The Court delivered its 6-3 decision on June 22, 2009.<sup>90</sup> The Court held in favor of T.A.'s parents, stating that the "IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate,

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83. *Forest Grove*, 523 F. 3d at 1078. The Ninth Circuit initially deferred the case pending the Supreme Court's decision in *Board of Education v. Tom F.* However, the Supreme Court did not reach a majority decision in that case, and so did not establish precedent.

84. *Forest Grove*, 523 F.3d at 1087-88.

85. *Id.* at 1087.

86. *Id.*

87. *Id.*

88. See *Forest Grove*, 523 F.3d 1078, 1081 (9th Cir. 2008); *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 376 (2d Cir. 2006); *M.M. v. Sch. Bd. of Miami-Dade County*, 437 F.3d 1085, 1098 (11th Cir. 2006); *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004).

89. *Forest Grove School District v. T.A.*, 129 S. Ct. 2484, 2490 (2009).

90. See *id.* at 2484.

regardless of whether the child previously received special education or related services through the public school.”<sup>91</sup>

#### IV. ANALYSIS OF THE *FOREST GROVE* DECISION

Justice Stevens delivered the opinion of the Court, joined by Chief Justice Roberts, Justice Kennedy, Justice Ginsburg, Justice Breyer and Justice Alito.<sup>92</sup> Justice Souter dissented in judgment, joined by Justice Scalia and Justice Thomas.<sup>93</sup>

##### A. JUSTICE STEVENS’ MAJORITY DECISION

The Court relied on its previous holdings in *Burlington* and *Carter*.<sup>94</sup> Although *Burlington* and *Carter* addressed a district’s failure to offer an IEP, rather than the appropriateness of a proposed IEP, the Court considered the factual differences insignificant.<sup>95</sup> The Court’s analysis in *Burlington* and *Carter* regarding the language and purpose of IDEA applied to *Forest Grove*.<sup>96</sup> The only new question was whether the 1997 Amendments, specifically the notice requirement in § 1412(a)(10)(C)(ii), required a different result.<sup>97</sup>

The Court concluded that the 1997 Amendments to IDEA did not impliedly repeal the *Burlington* and *Carter* decisions because Congress presumably adopts judicial interpretations when it reenacts a statute without change.<sup>98</sup> Rejecting the district’s argument, the Court held the 1997 Amendments did not prohibit reimbursement in *Forest Grove*. In reaching that conclusion, the Court found that § 1412(a)(10)(C)(i) explicitly barred reimbursement only when the public school provided the child with a FAPE.<sup>99</sup> The provision made no reference to the availability of tuition reimbursement when the school district failed to meet the FAPE requirement.<sup>100</sup> Therefore, it would follow that where a school district failed to provide the child with a FAPE, tuition reimbursement would be an available remedy.<sup>101</sup>

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91. *Forest Grove*, 129 S. Ct. at 2496.

92. *Id.* at 2484.

93. *Id.*

94. *Forest Grove*, 129 S. Ct. at 2490-91.

95. *Id.* at 2491. The Court reasoned, “when a child requires special education services, a school district’s failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP.”

96. *Id.*

97. *Id.*

98. *Id.* at 2494 (“Absent a clearly expressed congressional intention, repeals by implication are not favored.” (quoting *Branch v. Smith*, 538 U.S. 254, 273 (2003))).

99. *Id.* at 2493.

100. *Id.*

101. *Id.*

Although § 1412(a)(10)(C)(ii) requires reimbursement only for children who previously received special education services, the Court pointed to the provision's permissive phrasing, which only specified courts "may require" reimbursement in certain circumstances and did not foreclose reimbursement awards in other situations.<sup>102</sup> The opinion advised the "clauses of § 1412(a)(10)(C) are thus best read as elucidative rather than exhaustive."<sup>103</sup>

The Court further concluded denying reimbursement in *Forest Grove* would be at odds with the general remedial purpose of IDEA and the 1997 Amendments because it contradicted IDEA's child-find requirements.<sup>104</sup> Pursuant to those requirements, states are obligated to "identif[y], locat[e], and evaluat[e] . . . [a]ll children with disabilities residing in the state" to ensure that they receive needed special-education services.<sup>105</sup> In the Court's view, "immunizing a school district's refusal to find a child eligible for special-education services no matter how compelling the child's need . . . would produce a rule bordering on the irrational."<sup>106</sup> Indeed, it would be peculiar of IDEA to afford parents a remedy when a school district failed to provide an appropriate education, but deny that remedy in the more egregious circumstance of the school district failing to provide an IEP altogether.<sup>107</sup>

Finally, the majority rejected the district's argument that under the Spending Clause, any conditions attached to a State's acceptance of funds must be unambiguous.<sup>108</sup> The Court explained that by virtue of accepting IDEA funds, states expressly agree to provide a FAPE to all students with disabilities.<sup>109</sup> Citing *Burlington*, the Court noted a reimbursement award merely required a school district "to belatedly pay expenses that it should have paid all along."<sup>110</sup> Moreover, states have been on notice since the *Burlington* decision that IDEA authorizes courts to order reimbursement in "appropriate" circumstances.<sup>111</sup> The majority also dismissed the district's argument that allowing reimbursement, in cases such as *Forest Grove*,

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102. *Forest Grove*, 129 S. Ct. at 2493. ("[C]lause (ii) is best read as elaborating on the general rule that courts may order reimbursement when a school district fails to provide a FAPE by listing factors that may affect a reimbursement award in the common situation in which a school district has provided a child with some special-education services and the child's parents believe those services are inadequate.").

103. *Id.*

104. *Forest Grove*, 129 S. Ct. at 2494-95.

105. *Id.* at 2495 (citing 20 U.S.C. § 1412(a)(3)(A) (2006)).

106. *Id.*

107. *Id.* at 2495.

108. *Id.*

109. *Id.*

110. *Id.* (citing *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370-71 (1985)).

111. *Id.*

would result in less cooperation and more financial burden.<sup>112</sup> Although parents “are entitled to reimbursement *only* if a federal court concludes both the public placement violated IDEA and the private school placement was proper under the Act,”<sup>113</sup> and courts retain discretion to reduce a reimbursement award if warranted by the equities, the “incidence of private-school placement at public expense is quite small.”<sup>114</sup>

#### B. DISSENT

Justice Souter filed a dissenting opinion, joined by Justices Scalia and Thomas.<sup>115</sup> Justice Souter agreed with the majority that IDEA’s provisions were indeed ambiguous in their silence concerning circumstances where no previous special education services or FAPE was available.<sup>116</sup> However, “when permissive language covers a special case, the natural sense of it is taken to prohibit what it fails to authorize.”<sup>117</sup> Justice Souter stated that § 1412(a)(10)(C)(i) may be read to imply that school districts can be expected to fulfill their obligations and to assert the general rule that unilateral placement cannot be reimbursed.<sup>118</sup> Meanwhile § 1412(a)(10)(C)(ii) imposes a “receipt of prior services limit on any exceptions to that general rule when school officials fall short of providing a FAPE.”<sup>119</sup> Accordingly, reimbursement for students who had not received such services was prohibited under the 1997 Amendments.

#### C. SUBSEQUENT HISTORY

The Supreme Court remanded *Forest Grove* to the U.S. District Court in Portland, Oregon.<sup>120</sup> The district court found T.A. ineligible for reimbursement.<sup>121</sup> The court pointed out that the parents unilaterally placed T.A. in Mount Bachelor Academy due to his drug and behavioral problems, which are not considered disabilities under IDEA.<sup>122</sup> In listing the reasons for enrolling T.A. at Mount Bachelor Academy, T.A.’s father failed to mention symptoms which brought T.A. under the purview of IDEA, such

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112. *Forest Grove*, 129 S. Ct. at 2495.

113. *Id.* (citing *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993)).

114. *Id.*

115. *Id.* at 2497.

116. *Forest Grove*, 129 S. Ct. at 2499.

117. *Id.* at 2500.

118. *Id.* at 2499-500.

119. *Id.* at 2500.

120. *Forest Grove Sch. Dist. v. T.A.*, No. CV 04-331-MO, 2009 U.S. Dist. LEXIS 115356, at \*1 (D. Or. Dec. 8, 2009).

121. *Id.* at, at \*3.

122. *Id.* at \*8-9 (“The decisive factor in this case is that T.A.’s parents appear to have enrolled T.A. in [Mount Bachelor Academy] not because of any disability recognized by the [IDEA] but because of his drug abuse and behavior problems.”).



as ADHD or "trouble with school work."<sup>123</sup> As a result, Forest Grove was not liable for T.A.'s tuition.<sup>124</sup>

## V. AN ILLUSORY WIN FOR PARENTS

*Forest Grove* is viewed as a victory for parents of children with disabilities who may now seek reimbursement for private school tuition, even if their child never attended a public school. The decision, however, provides no actual assurance to parents in this atypical situation and only removes the absolute bar to tuition reimbursement, indicating that the actual implications of the decision may be less significant than they appear.

### A. IMPACTS ONLY A SMALL PERCENTAGE OF TUITION REIMBURSEMENT CASES

Although *Forest Grove* serves to expand IDEA's coverage to situations where students have not been enrolled in, or classified by, a public school, the decision's actual impact is limited by the significant number of requirements parents must meet under IDEA. Only in rare cases do parents seek reimbursement for private school tuition before first enrolling the child into a public school.<sup>125</sup> In 2006, only 0.97% of children with disabilities were placed in private placements at the public expense, and in 2007 the percentage increased slightly to 1.13%.<sup>126</sup> Of these private placements, the overwhelming majority account for "agreed placements," which are placements that both the school district and the parents agree are necessary to ensure the child in question receives an appropriate education under IDEA.<sup>127</sup> This also substantiates the argument that parents who

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123. *Id.* at \*9-10. On the application, T.A.'s father indicated that, "enrollment was precipitated by 'inappropriate behavior, depression, opposition, drug use, runaway.'" (citation omitted).

124. *Id.* at \*11.

125. See U.S. Dep't of Educ., *Data Tables for State Office of Special Education Programs ("OSEP") Data, IDEA Part B Educational Environment*, Tbl. 2-2 (Fall 2006), [http://www.ideadata.org/tables30th/ar\\_2-2.htm](http://www.ideadata.org/tables30th/ar_2-2.htm) [hereinafter "U.S. Dep't of Educ. (2006)"]; U.S. Dep't of Educ., *Data Tables for State Office of Special Education Programs ("OSEP") Data, IDEA Part B Educational Environment*, Tbl. 2-2 (Fall 2007), [http://www.ideadata.org/TABLES31ST/AR\\_2-2.htm](http://www.ideadata.org/TABLES31ST/AR_2-2.htm) (In 2007, 67,729 children out of 5,978,081 children were placed in a private setting at public expense. In 2006, it was 57,078 children out of 5,888,227 children. The 2006 and 2007 data is the most current data available. Coincidentally, these percentages were quite similar in 1997, when Congress amended IDEA in such a way that the dissent in *Forest Grove* believed would limit burden of private placements.) [hereinafter "U.S. Dep't of Educ. (2007)"].

126. U.S. Dep't of Educ. (2006), *supra* note 125; U.S. Dep't of Educ. (2007), *supra* note 125.

127. Brief for Nat'l Sch. Boards Ass'n et al. as Amici Curiae Supporting Petitioner, *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct 2484 (2009)(No. 08-305); see also 20 U.S.C. § 1412(a)(10)(B) (2006) (discussing children with disabilities who are placed in or referred to private schools by the public agency as the means of carrying out the requirements of IDEA).

typically request tuition reimbursement do so based on a sincere belief that the IEP provided by the public school does not meet the requirements of a FAPE.<sup>128</sup>

Generally, school districts only agree to transfer a student to a private placement as a last resort. Because schools receive federal funding to provide a FAPE to children with disabilities, they have an interest in retaining the special education population. For every child removed to a private placement, the money allocated for that child's education follows him to the new school. Considering this financial incentive, schools will only agree to private placement in cases of clear necessity, meaning only children with severe disabilities. Because it is rare for a child with disabilities to be placed in private school under IDEA, only under exceptional circumstances do parents ever receive tuition reimbursements without the agreement of the public schools. As such, the applicability of *Forest Grove* reaches such a narrow category of cases that it is hardly a significant victory for the special education community.

Forest Grove School District's attorney, Andrea Hungerford, argued that the *Forest Grove* decision broadened the scope of a FAPE, claiming that "[n]ow it's not only the parents of special education students who can seek private reimbursement, but it's also the parents of regular education students who can say, 'you should have identified my child under IDEA, but you did not, and now I want consideration.'"<sup>129</sup> Hungerford exaggerated the breadth of the decision, because the "notice and cooperation" requirement of § 1412(a)(10)(C)(iii) weeds out those claimants who Hungerford fears will bring frivolous lawsuits against the school district. Further, claims brought on behalf of regular education students would only survive upon a showing of special needs. Only those parents who diligently pursued special education services from the public school, but were denied, have a chance at overcoming the hurdle of § 1412(a)(10)(C)(iii). To determine whether the right to reimbursement exists, courts "must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child."<sup>130</sup> As was the case prior to *Forest Grove*, courts retain the option to reduce or deny the cost of reimbursement based on the above factors. This does not open the floodgates of litigation for parents of

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128. *Id.*

129. Nancy Townsley, *U.S. Supreme Court Interprets Law to Say that Parents of Special Needs Students can Seek Tuition Reimbursement for Private Schooling*, FOREST GROVE NEWS-TIMES, June 23, 2009, available at [http://www.forestgrovenewstimes.com/news/print\\_story.php?story\\_id=124582710640480800](http://www.forestgrovenewstimes.com/news/print_story.php?story_id=124582710640480800) (last visited Mar. 29, 2010).

130. *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2496 (2009).

general education students to sue if they never exercised reasonable efforts to attain special education services from the public school to begin with.<sup>131</sup>

*Forest Grove* impliedly affects only those students in the most egregious circumstance — students denied services due to a failure of the school's child-find responsibilities.<sup>132</sup> Under IDEA, if a child's behavior raises a red flag, the school district has an affirmative duty to evaluate her, and provide appropriate services if she is eligible. After *Forest Grove*, a school violates the FAPE requirement if it miscalculates a child and finds her ineligible, or breaches its duty to evaluate the child altogether. The child's parent, after paying for private school services, may bring a suit for reimbursement, even though special education services were not previously received.

#### B. PARENTAL DISADVANTAGES: DIFFICULTY IN PREVAILING

After *Forest Grove*, parents may obtain private school tuition reimbursement even though their child never received special education services from the public school. To receive tuition reimbursement, parents must make two separate showings: The school district failed to provide a free appropriate public education, *and* the private placement was appropriate.<sup>133</sup> These showings, however, may prove difficult for parents. Parents are often overwhelmed, not only by the complexities of dealing with a child with disabilities, particularly those who would need private placement in the first place, but also by partaking in a process for which they have no training, often have little time, and rarely have the resources to appropriately tackle the process.

##### 1. Parents' Burden of Proof

It is painstaking for parents to exercise their legal rights, despite the apparent protections. The due process system is practically undecipherable without legal assistance, and the likelihood of prevailing is remote without expert witness testimony.<sup>134</sup> The burden of proof is even heavier as a result of *Arlington Central School District v. Murphy*, which denies

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131. In fact, the burden of proof on parents in reimbursement cases is so high as to unjustly prevent parties with potentially valid claims from prevailing on the merits. See *infra* Section III.B.

132. Pursuant to IDEA's child-find requirement, states are obligated to "identif[y], locat[e], and evaluat[e]" "[a]ll children with disabilities residing in the state" to ensure that they receive needed special education services. *Forest Grove*, 129 S. Ct. at 2495 (citing 20 U.S.C. § 1412(a)(3)(A) (2006)).

133. See *Shaffer v. Weast*, 546 U.S. 49 (2005) (holding that the party seeking relief in an administrative proceeding carries the burden of proof and persuasion, unless there is guidance on the issue from IDEA/97).

134. Kelly D. Thomason, Note, *The Costs of a "Free" Education: The Impact of Schaffer v. Weast and Arlington v. Murphy on Litigation Under IDEA*, 57 DUKE L.J. 457, 472-473 (2007).

reimbursement of expert witness fees to prevailing parents in IDEA litigation.<sup>135</sup> Without expert witness reimbursement, few parents can afford the very witnesses that are an integral part of the hearing. Requiring parents to shoulder the costs of hiring experts to rebut the presumption of a proper IEP effectively denies the parents a “free” appropriate public education for their child.<sup>136</sup>

The impacts of these burdens on the household of the special education students are even more troubling.<sup>137</sup> Despite similar employment patterns, parents of children with disabilities tend to earn less in comparison to parents of non-special needs children.<sup>138</sup> Of the seven million children across the country that receive special education services under IDEA, approximately thirty-six percent live in residences with an income of \$25,000 or less, and thirty-two percent live in residences with an income of between \$25,000 and \$50,000.<sup>139</sup> The majority of these households do not have resources to hire expert witnesses, leaving parents with little opportunity to prove that the district violated the FAPE requirement. This effectively strips them of their right to a hearing under IDEA. Even if parents could raise the money for litigation, they will not be reimbursed for these substantial costs should they eventually prevail.<sup>140</sup> The same problems arise when parents face the costs of private school special education services. Many parents are not able to afford the high cost of private education, even if they anticipate reimbursement resulting from successful litigation.<sup>141</sup>

In contrast, school districts have a clear advantage.<sup>142</sup> They only need to show that the student’s IEP was “reasonably calculated to enable the child to receive educational benefits.”<sup>143</sup> Large school districts typically have the resources necessary to hire specialized lawyers, special educators,

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135. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 294 (2006); Thomason, *supra* note 134, at 483.

136. Thomason, *supra* note 134, at 486. (“When parents must pay for their own experts in order to satisfy the burden of proof in a hearing to guarantee their child’s free and appropriate education, that education is no longer free, but rather carries very high costs.”).

137. *Id.* at 483.

138. *Id.*; MARY WAGNER ET AL., U.S. DEP’T OF EDUC., THE CHILDREN WE SERVE: THE DEMOGRAPHIC CHARACTERISTICS OF ELEMENTARY AND MIDDLE SCHOOL STUDENTS WITH DISABILITIES AND THEIR HOUSEHOLDS 24, 28 (2002), [http://www.seels.net/designdocs/SEELS\\_Children\\_We\\_Serve\\_Report.pdf](http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf).

139. Mitchell H. Rubinstein, *Parents as Quasi-Therapists Under the Individuals With Disabilities Education Act*, 76 U. CIN. L. REV. 899, 913 (2008) (citing WAGNER, *supra* note 138).

140. Rubinstein, *supra* note 139, at 913.

141. *Id.*

142. Jay P. Greene, *A Special Plan for Palin*, NAT’L REV., Sept. 9, 2008, <http://article.nationalreview.com/?q=MzFIN2ZmNzMxYWY3MGE5NmIyZTU2OWEyYWVlZDhlNjc=&w=MA> (last visited Mar. 29, 2010).

143. *Hendrick Hudson*, 458 U.S. at 207.

psychologists and other expert witnesses that can testify on their behalf.<sup>144</sup> In fact, one study found parents were substantially unlikely to win against school districts, losing about seventy percent of the time.<sup>145</sup> A 2002 report from the President's Commission on Excellence in Special Education stated that "[t]he current system often places process above results, and bureaucratic compliance above student achievement, excellence and outcomes. The system is driven by complex regulations, excessive paperwork and ever-increasing administrative demands at all levels . . ."<sup>146</sup> Although parents have legal rights, litigation is expensive, time-consuming, and emotionally draining — all before facing the insurmountable burden necessary to prevail on the merits. One commentator goes so far as to compare the difficult task parents face in challenging school boards to "that of jailhouse lawyers, who are inmates themselves, seeking to represent fellow prisoners in court litigation."<sup>147</sup> Even when parents feel that the public education system has done a disservice to their child, there is not much they can do despite all the seemingly protective legal regulations in place.

## 2. Lack of Guidance

Even if parents are fortunate enough to meet the burden of showing the school failed to provide a FAPE, they must still show that the private education program of their choice is "appropriate." The absence of a clear definition of "appropriateness" often cuts in favor of the school district, creating a challenge similar to that of proving a FAPE violation.

The current *Rowley* standard is far too subjective and equivocal to be applied effectively.<sup>148</sup> The absence of a substantive definition for an "appropriate" education has caused considerable litigation between parents and school districts, and poses a significant hurdle for parents. Without the

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144. Thomason, *supra* note 134, at 472.

145. Learning Disabilities Association of Illinois, Due Process Hearings, <http://www.ldail.org/hearing.cfm> (last visited Feb. 16, 2010).

146. Rubinstein, *supra* note 139, at 904 (citing PRESIDENT'S COMM'N ON EXCELLENCE IN SPECIAL EDUC., A NEW ERA: REVITALIZING SPECIAL EDUC. FOR CHILDREN AND THEIR FAMILIES 7 (2002), available at <http://www.ed.gov/inits/commissionsboards/whspecial/education/reports/images/PresRep.pdf>).

147. *Id.*

148. In *Bd. of Ed. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1982) the Court set forth a two-part test: "First, has the state complied with the procedures set forth in the Act? And second, is the Individualized Education Program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" 458 U.S. at 206-07. The second prong of the test has proven difficult for courts in ascertaining how much benefit is necessary to meet the standard. *See, e.g., Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180 (3rd Cir. 1988) (holding that educational benefit must be "more than trivial"); *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 861-62 (6th Cir. 2004) (stating benefit must be "more than de minimis").

ability to gauge appropriateness, parents engaging in a cost/benefit analysis face an incalculable probability of success, and must blindly bear the risk of litigation. David Harris, a special education attorney, pointed out, “[i]t was a bad case for the court to take [because] it did not give much general guidance in situations where parents are unhappy with what a school district offers in terms of special education.”<sup>149</sup> In light of the limited impact of *Forest Grove* on the special education community, it is increasingly important to ensure all students with disabilities are indeed receiving a FAPE.

## VI. MOVING BEYOND *FOREST GROVE*

Although the immediate impact of *Forest Grove* is modest, it may serve special education interests in the long term by changing the way schools and parents think about these services. The holding in *Forest Grove* opens the door for diligent parents to hold schools accountable when they fail to identify a student’s special needs and provide a FAPE. It also forces parents to do their due diligence when advocating for their children by reiterating the notice and cooperation requirements of IDEA. Increased accountability among schools and parents may in fact reduce litigation costs by placing money where it belonged in the first place — on special educational services.

*Forest Grove* cautions school districts to conduct thorough evaluations that take into account both apparent and hidden disorders when determining eligibility under IDEA.<sup>150</sup> Not only will school districts need to actively identify and serve children with special education needs, but they will also put more consideration into the type of services that are appropriate for the child.<sup>151</sup> Students who have fallen through the cracks and been denied necessary services now have a voice to demand that education. For example, on remand, the district court found that the evaluation for T.A. was not sufficient because he was not evaluated in all areas of suspected need as required by law.<sup>152</sup> As a result, schools will be

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149. Stull, *supra* note 6.

150. Charles P. Conroy, *The Tragedy and Triumph of T.A.*, BOSTON GLOBE, June 25, 2009, at A15, available at [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2009/06/25/the\\_tragedy\\_and\\_triumph\\_of\\_ta/](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/06/25/the_tragedy_and_triumph_of_ta/) (“The true winners were children with what one might call hidden disabilities — social, emotional, and learning needs that are often less apparent than some visual, auditory, ambulatory, or intellectual challenges.”).

151. See Kari Miller, *Expert Perspective; Thoughts on Forest Grove School District vs. T.A.*, examiner.com, June 27, 2009, <http://www.examiner.com/x-10067-LA-Special-Education-Examiner-y2009m6d27-Expert-perspective-thoughts-on-Forest-Grove-School-District-vs-TA> (last visited Mar. 29, 2010).

152. Specifically, no evaluation was ordered for “other health impairments” although notations made during a previous evaluation regarded the possibility that T.A. suffered from ADHD.

more aware of students who may fall into this category and will work rigorously to determine an appropriate IEP.

Similarly, if schools do not offer an appropriate IEP in a timely manner, parents are no longer forced to keep their child in the inappropriate placement in order to preserve their reimbursement claim. As a result, it will be in the school districts' best interest to be more responsive to parental concerns and ensure that any necessary services are administered as soon as possible.

One of the most common aversions to *Forest Grove* stems from a fear that the number of parents requesting reimbursement for expensive private placements will skyrocket. As *Forest Grove* clarifies, in a hearing for reimbursement, judges must consider the level of cooperation between the school and parents when awarding damages. As a result, only meritorious claims will result in damage awards. This gives parents an incentive to cooperate with school districts to attain appropriate services before unilaterally placing their child into a private placement.

School districts are rightfully concerned about finances. However, school districts may not improperly allow budget concerns to trump their statutory obligations to provide a FAPE to every child in the district. Justice O'Connor described the thriftiest solution available to school districts: "[P]ublic educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: Give the child a free[,] appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice."<sup>153</sup>

The time and money spent litigating education would be better spent on providing adequate services to the students who need them. Parents who bring claims typically do so because they believe there is no other alternative to obtaining an appropriate education for their child.<sup>154</sup> As the Supreme Court noted, the legal system is an ineffective remedy for the denial of a child's FAPE. Parents are not eager to run to the courthouse, so measures that establish a greater rapport between parents and schools would reduce the number of parents who are forced to resort to litigation.

## VII. CONCLUSION

While the Supreme Court's decision in *Forest Grove* is arguably a victory for parents of children with disabilities, its direct impact on the special education community is narrower than first thought. The decision

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153. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993).

154. *See Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 2011 (2007) (Scalia, J., dissenting) (stating cases seeking reimbursement are unlikely to be frivolous because it is unreasonable for parents to pay for litigation over a tuition reimbursement without a substantial belief that the IEP offered is inappropriate).

affects only a small percentage of tuition reimbursement cases because it is unusual for a parent to seek reimbursement for a private placement before their child attends public school. Essentially, its force is limited to one particular circumstance: Students who have not previously received special education services due to a failure of the public school's child-find responsibilities. Moreover, *Forest Grove's* ultimate disposition on remand illustrates the substantial obstacles these parents still face: They must meet a high evidentiary burden under *Shaffer*, they must front their own high (but often necessary) expert witness costs under *Arlington*, and finally they face the lack of judicial guidance on what constitutes an "appropriate" education.<sup>155</sup>

Making certain IDEA is unambiguous and avoids inequitable results is of great import to the future of our nation. Young children, who receive appropriate services from a young age, require fewer special education services later in their education, are not held back as often, and maintain higher test scores in comparison to children who do not receive the appropriate services and accommodations.<sup>156</sup> "If the city and other school districts put as much energy into improving their special education offerings as it does using special education as a scapegoat, fewer students would need private placement in the first place."<sup>157</sup> Thus, when children receive appropriate services, as IDEA intended, they have more potential to serve as productive members of our society and need less support and services from the government as adults. Courts must properly interpret IDEA's provisions within the spirit of its intentions to ensure children receive the services necessary for them to lead meaningful and fulfilling lives.

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155. See *Shaffer v. Weast*, 546 U.S. 49 (2005); see *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 294 (2006).

156. F.A. Campbell et. al., *Early Childhood Education: Young Adult Outcomes from the Abecedarian Project*, in 6 APPLIED DEVELOPMENTAL SCI. 2, 43-44, 52 (2002).

157. Jay Greene & Marcus Winters, *No More Excuses: Freston as Scapegoat*, N.Y. SUN, Nov. 8, 2007, available at <http://www.nysun.com/opinion/freston-as-scapegoat/66084/>.



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